

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte LILLIAN S. KACHMAR

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Appeal No. 97-3204  
Application 29/024,652<sup>1</sup>

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ON BRIEF

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Before CAROFF, ABRAMS and BARRETT, Administrative Patent Judges.

ABRAMS, Administrative Patent Judge.

DECISION ON APPEAL

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<sup>1</sup> Application for patent filed June 20, 1994.

Appeal No. 97-3204  
Application 29/024,652

This is an appeal from the final rejection of the following design claim:

The ornamental design of a **Textile Casing for Furniture Cushions** as shown and described.

The invention is depicted in the drawings in eight views.

As evidence of the obviousness of the appellant's design the examiner has cited the following reference:

Love	1,659,405	Feb. 14,
1928		

The claim stands rejected under 35 U.S.C. § 103 as being unpatentable over Love.

The rejection is explained in the Examiner's Answer.

The opposing viewpoints of the appellant are expressed in the Appeal Brief.

#### OPINION

The examiner has rejected this design claim on the basis that it would have been obvious in view of the showing of Love, considering certain differences to be *de minimis*. Our reviewing court has provided the following guidance for decid-

ing the issue of the obviousness of a design claim in such a case:

In rejecting a claim to an ornamental design under 35 U.S.C. § 103, the examiner must supply a basic design reference that bears a substantially identical visual appearance to the claimed design. *In re Harvey*, 12 F.3d 1061, 1063, 29 USPQ2d 1206, 1208 (Fed Cir. 1993). That is, there must be a reference, a something in existence, the design characteristics of which are basically the same as the claimed design; once a reference meets this test,

reference features may reasonably be interchanged with or added from those in other pertinent references. See *In re Rosen*, 673 F.2d 388, 391, 213 USPQ 347, 350 (CCPA 1982). The examiner must then explain or offer evidence showing why the differences between the reference design and the claimed design would have been considered to be *de minimis* to the ordinary designer in the field of the articles involved. See *In re Carter*, 673 F.2d 1378, 1380, 213 USPQ 625, 626 (CCPA 1982). "However, the evaluation of the whole necessarily

involves consideration of what are indicated to be the distinguishing features of the claimed design." *Petersen Mfg. Co. Inc. v. Central Purchasing, Inc.*, 740 F.2d 1541, 1548, 222 USPQ 562, 567 (Fed. Cir. 1984).

It is the examiner's position that Love constitutes the required *Rosen* reference, and that while there are several differences in the visual appearance of the two designs, these are de minimis changes which do not affect the appearance of the claimed design as a whole and the impression that the design would make to the eye of the designer of ordinary skill in this art (Answer, page 5).

The appellant, on the other hand, argues on pages 6 through 8 of the Brief that there are four visual differences which give rise to a difference in overall appearance between the claimed design and the reference, to wit:

- (1) The squared corners of the claimed design as opposed to the rounded ones of the reference.
- (2) The smooth uninterrupted contour of the edges of the claimed design as opposed to the peripheral bindings of the reference.
- (3) The presence of protruding fasteners on the reference where there are none in the claimed design.

(4) The relatively thick cross-sectional shape of the claimed design as opposed to the substantially flat, trapezoidal shape of the reference.

Even assuming, *arguendo*, Love to be a *Rosen* reference, we find ourselves in agreement with the appellant that differences exist between the claimed design and that of Love which are of such magnitude as to be beyond *de minimis*, causing the visual appearance of the claimed device to be patentably distinguished from that of the reference. Of particular note in this regard is the presence of peripheral bindings (10) around the edges of the Love seat pad, which not only cause a pattern to be visible where the claimed design has none (top views), but presents a folded shoulder (10) and a trapezoidal cross-section (Figure 5) where that of the claimed design is shoulderless and rectangular. The rounded corners of Love as compared to the rectangular one of the claimed design also figure in our conclusion that the overall visual appearance of the claimed design differs from that of Love

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beyond what the ordinary designer in this field would view as  
*de minimis* differences.

The decision of the examiner is reversed.

REVERSED

	)	
MARC L. CAROFF	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
NEAL E. ABRAMS	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
	)	
LEE E. BARRETT	)	
Administrative Patent Judge	)	

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